

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

2:08-CR-024-JCM-GWF

JESUS MENDEZ,)

Defendant.)

ORDER

Presently before the court is petitioner Jesus Mendez's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Doc. #91). The government has filed a response (doc. #97), to which petitioner has not replied.

Also before the court is petitioner's motion to reconsider this court's prior order denying the appointment of counsel for the petitioner. (Doc. #99).

I. Background

On April 21, 2009, petitioner pleaded guilty to possession with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(a)(2). (Doc. #62). On January 13, 2010, this court sentenced petitioner to 120 months in prison, followed by five years of supervised release. (Doc. #73). The Ninth Circuit Court of Appeals affirmed the conviction on December 22, 2010. (Doc. #87).

Subsequently, on December 19, 2011, petitioner filed the instant motion. Petitioner contends that (1) his guilty plea was unlawfully induced; (2) the government obtained his conviction by use of evidence gained pursuant to an unconstitutional search and seizure; (3) his trial and appellate

1 counsel did not provide effective assistance; (4) he should have been granted safety valve relief; and
2 (5) this court lacked jurisdiction over his case.

3 **II. Discussion**

4 **§ 2255 Motion**

5 **A. Legal Standard**

6 Pursuant to 28 U.S.C. § 2255, a person in custody under a judgment by a district court may
7 file a petition for a writ of habeas corpus if he seeks a determination that (1) the judgment violates
8 the Constitution or laws of the United States, (2) the court lacked jurisdiction to enter the judgment,
9 (3) the sentence exceeded the maximum allowed by law, or (4) the judgment or sentence is otherwise
10 subject to collateral review.

11 **1. Ground One: Guilty Plea Unlawfully Induced**

12 Petitioner contends that he pleaded guilty without understanding the consequences of his plea.
13 Specifically, petitioner claims that his appellate counsel assured him that the denial of his motion to
14 suppress could be raised on appeal. Mot. Vacate at 5.

15 “[I]t is well-settled that an unconditional guilty plea constitutes a waiver of the right to appeal
16 all nonjurisdictional antecedent rulings and cures all antecedent constitutional defects.” *United States*
17 *v. Lopez-Armenta*, 400 F.3d 1173, 1175 (2005). Once a guilty plea is entered, a petitioner may “only
18 attack the voluntary and intelligent character of the guilty plea.” *Tollett v. Henderson*, 411 U.S. 258,
19 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973).

20 This court found that petitioner’s unconditional guilty plea was knowing and voluntary at the
21 time the plea was entered. (Doc. 81 at 21-22). Before accepting petitioner’s guilty plea, the court
22 confirmed that petitioner “had ample opportunity” to discuss his case with his attorney and that
23 petitioner was satisfied with his attorney. (Doc. #81 at 6). Ultimately, petitioner never contends that
24 he was misinformed by his attorney, the prosecution, or the court at the time he chose to enter a plea
25 of guilty. Mot. Vacate at 5.

26 The only claim petitioner makes with any specificity is that his appellate attorney told him
27 that he could appeal the denial of his motion to suppress. The truth of this claim is irrelevant. By
28 the time petitioner had any conversations with his appellate attorney, he had already entered his guilty

1 plea and waived his right to appeal antecedent constitutional defects. In *United States v. Floyd*, 108
2 F.3d 202 (1997), the Ninth Circuit ruled that any misunderstanding of the law based on a
3 conversation with appellate counsel “cannot somehow relate back to [the] plea hearing” and render
4 the plea unknowing or involuntary. *Id.* at 204.

5 The defendant in *Floyd* had a strong objective basis for her claim that she had been
6 misinformed. At her sentencing hearing, three months after she pleaded guilty, her attorney informed
7 the court, on the record, that Floyd planned to appeal the denial of the suppression motion in her case.
8 The court responded, “Surely.” *Id.* at 203. Both her attorney and the court mistakenly believed she
9 could appeal an antecedent constitutional defect after an unconditional guilty plea. Even under these
10 circumstances, the Ninth Circuit found that any erroneous beliefs this caused could not “relate back”
11 to her plea hearing.

12 In the instant case, petitioner claims only that his attorney misinformed him in a private
13 conversation well after he entered his guilty plea and was sentenced. If the defendant’s misunder-
14 standing in *Floyd*, triggered by statements her attorney and the court made on the record are not
15 enough to relate back, this petitioner’s after the fact private conversation with his attorney cannot
16 relate back. Petitioner makes no specific claim that his plea was unknowing or involuntary at the
17 time that it was entered. Therefore, petitioner’s first claim is dismissed.

18 Reasonable jurists would not find this conclusion to be debatable or wrong. Therefore, this
19 court will not issue a certificate of appealability on ground one.

20 **2. Ground Two: Unconstitutional Search and Seizure**

21 As stated above, “an unconditional guilty plea constitutes a waiver of the right to appeal all
22 nonjurisdictional antecedent rulings and cures all antecedent constitutional defects.” *See Lopez-*
23 *Armenta*, 400 F.3d at 1175. Petitioner’s claim that his guilty plea was unlawfully induced is
24 dismissed. Therefore, his unconditional guilty plea results in a waiver of the right to appeal the
25 denial of his motion to suppress.

26 Petitioner had a full opportunity to be heard before this court concerning his Fourth
27 Amendment claims and this court denied petitioner’s motion to suppress. (Doc. #59). Petitioner’s
28 claim has been heard and his right to appeal has been waived. Petitioner’s second claim is dismissed.

1 Reasonable jurists would not find this conclusion to be debatable or wrong. Therefore, this
2 court will not issue a certificate of appealability on ground two.

3 **3. Ground Three: Ineffective Assistance of Counsel**

4 To establish ineffective assistance of counsel, the petitioner must demonstrate that the
5 counsel's conduct was not "within the range of competence demanded of attorneys in criminal cases,"
6 and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of
7 the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694
8 (1984). The purpose of guaranteeing effective assistance of counsel is "to insure that criminal
9 petitioners receive a fair trial." *Id.* at 689.

10 **a. Trial Counsel**

11 Petitioner claims that his counsel failed to file an interlocutory appeal contesting the denial
12 of the motion to suppress. However, the Ninth Circuit recognizes a "bright-line rule" that an
13 interlocutory appeal of the denial of a motion to suppress is available only to the government. *United*
14 *States v. Eccles*, 850 F.2d 1357, 1362 (1988). "[I]nterlocutory review is the child of necessity." *Id.*
15 The government would be barred by the double jeopardy clause from a post-acquittal review while
16 post conviction review is available to the defendant. *Id.* Therefore, while interlocutory appeal of the
17 granting of a motion to suppress is necessary for the government, it is not necessary for defendants.
18 It is only because the petitioner waived his right to appeal nonjurisdictional antecedent rulings when
19 he entered his unconditional guilty plea that all avenues of appealing the denial of the motion to
20 suppress were exhausted.

21 The remainder of petitioner's contentions of ineffectiveness at the pretrial stage are vague,
22 conclusory, or both, and warrant summary dismissal. *See Shah v. United States*, 878 F.2d 1156, 1161
23 (9th Cir. 1989) (vague or conclusory allegations in § 2255 claims warrant summary dismissal).

24 **b. Appellate Counsel**

25 Petitioner alleges that his appellate counsel (1) failed to seek a rehearing before the Ninth
26 Circuit en banc; (2) failed to seek certiorari before the Supreme Court; (3) failed to challenge the
27 jurisdiction of this court pursuant to 18 U.S.C. 3231; and (4) failed to research legal issues in a timely
28 and effective manner.

1 According to the Supreme Court, there is no constitutional right to counsel for discretionary
2 appeals. *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974). The Ninth Circuit has held that “[t]he
3 fourteenth amendment right to the effective assistance of appellate counsel is derived entirely from
4 the fourteenth amendment right to appellate counsel, and the former cannot exist where the latter is
5 absent.” *Miller v. Keeney*, 882 F.2d 1428, 1431-1432 (1989). Therefore, there is no right to the
6 effective assistance of counsel once the direct appeals process is complete. Petitioner had no need
7 to decide whether or not to seek a rehearing before the Ninth Circuit en banc or seek certiorari before
8 the Supreme Court until his final direct appeal had been denied. In other words, the mere need for
9 such a decision “presupposes... the defendant’s constitutional right to counsel, has come to an end.”
10 *Id.* at 1432. For these reasons, petitioner’s first two allegations are not grounds for relief.

11 As explained below, petitioner’s claim that this court lacks jurisdiction under 18 U.S.C. 3231
12 is without merit. Failure to raise a meritless claim does not constitute ineffective assistance of
13 counsel. *See Wilson v. Henry*, 185 F.3d 986, 991 (9th Cir. 1999). Finally, petitioner’s general claim
14 that his appellate counsel’s research was inadequate is both vague and conclusory, and therefore fails
15 to state a claim upon which relief may be granted. *See Shah*, 878 F.2d at 1161. For the foregoing
16 reasons, petitioner’s third claim is dismissed.

17 Reasonable jurists would not find this conclusion to be debatable or wrong. Therefore, this
18 court will not issue a certificate of appealability on ground three.

19 **4. Ground Four: Erroneous Denial of Safety Valve Relief**

20 Petitioner claims that this court erred when it denied safety valve relief in this case. As
21 petitioner acknowledges, he has already been heard on this issue on direct appeal to the Ninth Circuit.
22 According to the Ninth Circuit, this court’s findings “were sufficient and not clearly erroneous.”
23 (Doc. #87). Once a defendant has had the opportunity to litigate and appeal a claim, “that claim may
24 not be used as basis for a subsequent § 2255 petition.” *United States v. Hayes*, 231 F.3d 1132, 1139
25 (9th Cir. 2000). Petitioner’s fourth claim is dismissed.

26 Reasonable jurists would not find this conclusion to be debatable or wrong. Therefore, this
27 court will not issue a certificate of appealability on ground four.

1 **5. Ground Five: 18 U.S.C. 3231 is Invalid**

2 “The district courts of the United States shall have original jurisdiction, exclusive of the
3 courts of the States, of all offenses against the laws of the United States.” 18 U.S.C. § 3231.

4 Petitioner contends that § 3231 was not properly enacted, and, as a result, this court did not
5 have jurisdiction to accept his guilty plea or sentence him to prison.

6 Every court to have considered such a claim has rejected it. For example, as recently as 2010
7 the Third Circuit has affirmed that “Section 3231 was properly enacted and is binding.” *Wolford v.*
8 *United States*, 362 Fed. Appx. 231, 232 (unpublished). Petitioner’s fifth claim is dismissed.

9 Reasonable jurists would not find this conclusion to be debatable or wrong. Therefore, this
10 court will not issue a certificate of appealability on ground five.

11 Motion to Reconsider Appointment of Counsel

12 “Reconsideration is appropriate if the district court (1) is presented with newly discovered
13 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an
14 intervening change in controlling law.” *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th
15 Cir. 1993); *see* Fed. R. Civ. P. 59(e); *see also* Fed. R. Civ. P. 60(b). Pursuant to 18 U.S.C. §
16 3006A(2)(B), “[w]henver the United States magistrate or the court determines that the interests of
17 justice so require, representation may be provided for any financially eligible person who” is seeking
18 “relief under section . . . 2255 of title 28.”

19 This court denied petitioner’s motion for appointment of counsel because all of his previous
20 communications with the court reflected a solid ability to read and write the English language and
21 effectively communicate with the court. (Doc. #98). His only new contention is that this court
22 should not use the composition of petitioner’s motion seeking appointment of counsel (doc. #96) as
23 evidence of his ability to communicate because he did not personally compose that document. (Doc.
24 #99).

25 The interests of justice do not require the court to appoint counsel in this case. As previously
26 explained, petitioner’s § 2255 motion is without merit.

27 For the reasons stated above,
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1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that petitioner Jesus Mendez's
2 motion to vacate, set aside, or correct sentence pursuant to § 2255 motion (doc. #91) be, and the same
3 hereby is, DENIED.

4 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that petitioner's motion to
5 reconsider this court's prior order denying the appointment of counsel for the petitioner (doc. #99)
6 be, and the same hereby is, DENIED.

7 IT IS FURTHER ORDERED that no certificate of appealability shall issue, as explained in
8 the body of the court's order.

9 DATED April 6, 2012.

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12 UNITED STATES DISTRICT JUDGE
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